Supreme Court, U.S.
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(2)

No. 90-1147

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD CANNISTRARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conduct violated the federal securities laws.

2. Whether petitioner received effective assistance of counsel in entering his plea of guilty.

3. Whether the proceedings at which petitioner's guilty plea was accepted conformed to Fed. R. Crim. P. 11.

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OPINIONS BELOW

The memorandum opinion of the court of appeals, Pet. App. 1a-3a, is unreported, but the judgment is noted at 919 F.2d 137 (Table). A prior opinion of the court of appeals is reported at 871 F.2d 1210. The opinion of the district court denying petitioner's motion to withdraw his guilty plea, Pet. App. 1b-59b, is reported at 734 F. Supp. 1110. A prior opinion of the district court is reported at 694 F. Supp. 62.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1990. The petition for a writ of certiorari was filed on January 14, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a plea of guilty in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; four counts of deceptively using nominee securities accounts, and one count of creating and distributing a misleading stock research report, in violation of 15 U.S.C. 78j(b); interstate transportation of money taken by fraud, in violation of 18 U.S.C. 2313; mail fraud, in violation of 18 U.S.C. 1341; and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to eight years' imprisonment and five years' probation, fined $330,000, and ordered to pay $394,947 in restitution. On petitioner's first appeal, the court of appeals remanded the case for reconsideration of the prison term imposed. On remand, petitioner moved to withdraw his guilty plea. After a hearing, the district court denied the motion and reimposed the same prison term. On petitioner's second appeal, the court of appeals affirmed. Pet. App. 1a-3a.

1. Petitioner was a securities research analyst with the brokerage firm of Wood Gundy, Inc., and an officer and director of Liquidation Control, Inc. (LCI). In November 1982, LCI made a public offering of securities. Monarch Funding Corporation served as the underwriter for the offering and as a market maker for aftermarket trading. At the time of the offering, petitioner established nominee accounts at Monarch in the names of Mary Godano, his aunt, and Edward Cannistraro, his father. Through those accounts petitioner, who already owned 975,000 shares of LCI stock, purchased 120,000 units (consisting of common stock and warrants) of LCI securities for $30,000. During December 1982 and

January 1983, petitioner sold the LCI securities in the nominee accounts for a profit of at least $90,000. C.A. App. 13, 18, 61, 64, 77-78, 83, 1022, 1033-1034.

In December 1982, petitioner proposed that William Fritz, portfolio manager of a trust fund (the M & I Fund), have the fund purchase large blocks of LCI securities. To induce those purchases, petitioner promised to open a nominee account at Monarch for Fritz and arrange for that account to be allocated shares of LCI and of another company, Toxic Waste Containment (TWC). Petitioner told Fritz that he "could make money" through the arrangement. Petitioner later arranged for the allocation to Fritz's account of 7,000 shares in the LCI offering; those shares were sold in February 1983 for a profit to Fritz of approximately $5,500. In March 1983, petitioner assisted in the purchase and sale for Fritz of TWC securities, for a profit of approximately $50,000. C.A. App. 60, 71-74.

In return, in December 1982 Fritz caused the M & I Fund to purchase 60,000 shares of LCI common stock for a total investment of $75,000. In February 1983, Fritz caused the M & I Fund to purchase an additional 50,000 shares of LCI common stock for approximately $84,000. In July 1983, Fritz sold the fund's 110,000 LCI shares for $35,000, or a loss to the fund of approximately $125,000. C.A. App. 1031.

In January 1983, petitioner entered into a similar agreement with Bynum Vickory, the portfolio manager of a mutual fund (the Bullock Fund). Petitioner established a nominee account at Monarch for Vickory and committed to have Vickory allocated stock in the next initial public offering at Monarch, namely TWC. That month Vickory caused the Bullock Fund to purchase 25,000 shares of LCI for a

total purchase price of approximately $40,000. Those shares were later sold for a loss to the fund of $25,000. Petitioner subsequently arranged for the Vickory nominee account to purchase 4,000 units of TWC securities, which were later sold for a profit to Vickory of approximately $25,000. C.A. App. 75-76, 1032.

In February 1983, TWC made a public offering of securities. At that time, petitioner established nominee accounts for himself at Monarch in the names of Donna Lee Clarambeau and Carl Alan Key. Clarambeau was paid for the use of her name. Through those accounts, petitioner purchased 80,000 units of TWC securities for a total cost of $20,000. On March 9, 1983, petitioner sold the TWC securities in the Key account for a profit of $4,695. On March 10, 1983, petitioner sold the TWC securities in the Clarambeau account for a profit of approximately $50,000. C.A. App. 62, 66, 69, 82, 1040, 1042.

In his capacity as a Wood Gundy analyst, petitioner drafted a research report recommending the purchase of TWC securities, in which he failed to disclose the existence of the nominee accounts or his arrangements with Fritz and Vickory. On March 10, 1983, petitioner caused a wire to be sent to Wood Gundy's offices throughout the world announcing that petitioner would soon be issuing the report. Petitioner caused Wood Gundy to issue the report on March 17, 1983, and again in April and May 1983. Petitioner also sent a copy of the report to Ground Floor Publications, an investment news organization, "hoping it would be used in Ground Floor's publication," and he confirmed false and misleading information in a telephone conversation with a reporter from Ground Floor. As a result, Ground Floor dis-

tributed to its subscribers another favorable report on TWC. C.A. App. 62, 68-69, 83-84, 1045.

As a result of petitioner's activities, petitioner and his co-conspirators netted approximately $250,000 in profits from the sale of LCI and TWC securities.[1] C.A. App. 1028.

2. Petitioner pleaded guilty to all nine counts of the indictment. Before accepting petitioner's plea, the district court conducted a hearing pursuant to Federal Rule of Criminal Procedure 11. In a statement at the time of his guilty plea and in response to questions propounded at that hearing by the court and the prosecutor, petitioner admitted facts establishing that he committed securities fraud by: (1) bribing investment fund managers to have their funds purchase securities in LCI, thereby defrauding the funds and manipulating the price of the stock to petitnoner's personal benefit, *e.g.*, C.A. App. 60-61, 71-76; (2) causing a prospectus to be used in sales of LCI securities that was false or misleading as to petitioner's role in the offering, in that it failed to disclose that he had secretly bought securities in the offering through nominee accounts, *e.g.*, *id.* at 61, and (3) issuing, in his capacity as a securities analyst at Wood Gundy, a research report recommending TWC securities, which report was false or misleading in that it was presented as a disinterested report, when in fact petitioner had significant interests in TWC arising out of his use of nominee accounts in trading in TWC stock, his bribery scheme, and his position at LCI, which was an affiliated company of TWC. See, *e.g.*, *id.* at 62, 83-85.

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[1] The unindicted co-conspirators were the fund managers and the nominees for petitioner and the fund managers.

Specifically, petitioner admitted that he knew that a fund's purchase of LCI stock "would have the likely [e]ffect of increasing the value of the shares of [LCI] in the open market and that as a beneficial owner of outstanding shares of [LCI], that I would likely benefit from the fund's purchases." C.A. App. 61. Petitioner acknowledged that his actions were done knowingly, intentionally, and willfully. *Id.* at 87, 91. Petitioner also admitted that his research report was false and misleading in the following respects: (a) it failed to disclose his use of nominee accounts to purchase TWC stock in the initial public offering, *id.* at 62, 83, 85; (b) it failed to disclose his arrangements with Fritz and Vickory, whereby those individuals were paid off with TWC securities, *id.* at 60, 83, 85; and (c) it failed to disclose his financial relationship to and executive position at LCI, a company that had an interlocking board of directors and common management with TWC, and rented office space in the same building. *Id.* at 62, 84-85. Petitioner admitted that he created the research report with the intent to increase the demand for and price of TWC securities. *Id.* at 84.

The district court determined that petitioner was competent to enter his plea and was aware of and understood the charges in the indictment and the elements of each charge.[2] Finding that petitioner's

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[2] Petitioner testified that he held a bachelor's degree and two graduate degrees. C.A. App. 42. He stated that he had reviewed the indictment and discussed it with his attorney, that his attorney had explained the criminal charges, the elements of each crime and the penalties for each crime, and that he understood the elements of conspiracy and of the substantive crimes that he was alleged to have committed. *Id.* at 43-45, 49-55.

statement and testimony furnished "an adequate factual basis" for his guilty plea, the court accepted the plea and adjudged petitioner guilty on each count of the indictment. C.A. App. 91-92.

3. Petitioner appealed his sentence. The court of appeals affirmed all aspects of the sentence except for the prison term of eight years. *United States* v. *Cannistraro*, 871 F.2d 1210, 1217 (3d Cir. 1989). Expressing concern that the district court might have relied on and misinterpreted data concerning sentences in other fraud cases, the court of appeals remanded the case to the district court for resentencing. *Id.* at 1217-1218.

4. On remand petitioner moved, for the first time, to withdraw his plea pursuant to Federal Rule of Criminal Procedure 32(d). He presented three grounds for withdrawing the plea: first, that he was denied effective assistance of counsel; second, that the court had accepted his plea without an adequate factual basis; and third, that his guilty plea hearing was defective in that the prosecutor, rather than the court, conducted some of the questioning that established the factual basis for the plea. Pet. App. 1b.

After several hearings, the district court found that petitioner had not presented a "fair and just reason" within the meaning of Fed. R. Crim. P. 32(d) for withdrawing his plea, and denied petitioner's motion. The court observed that petitioner had not sought to withdraw his plea until one and a half years after entering it, and then only after "what amounts to a loss on appeal." Pet. App. 28b. The court also took note of petitioner's failure to testify in support of his motion, *id.* at 14b; and it observed that petitioner was not asserting his innocence, but "merely contend[ing] that the plea allocution did

not establish an adequate factual basis" for the plea. *Id.* at 24b. Those circumstances, the court stated, suggest that petitioner "does not believe he is innocent, but merely is unhappy with the sentence originally imposed." *Id.* at 23b.

After re-examining petitioner's admissions at the plea hearing, the court again concluded that an adequate factual basis existed for acceptance of the plea. The court recounted petitioner's admissions as to his quid pro quo arrangement with Vickory and Fritz, and concluded that the arrangement "which the Government aptly characterizes as a bribery scheme, worked a fraud on shareholders of the Funds in violation of Rule 10b-5." Pet. App. 30b. The court noted that petitioner admitted that "as a stock analyst for Wood Gundy, he failed to disclose the bribery scheme * * * and his own use of nominee accounts in connection with TWC." *Ibid.* The court concluded that "[a]s an allegedly disinterested stock analyst, [petitioner] had a duty to disclose his interest in TWC to Wood Gundy investors" and that his admitted failure to do so violated Section 10(b) and Rule 10b-5. Pet. App. 30b-31b. The court also recounted petitioner's admissions with regard to his nominee accounts and concluded that his admitted failure to disclose to the public his interests in or control of these accounts violated Section 10(b) and Rule 10b-5. Pet. App. 31b-32b. Finally, the court noted that petitioner had admitted his failure to disclose material information in his research report concerning TWC, also in violation of Section 10(b) and Rule 10b-5. Pet. App. 32b.[3]

[3] With respect to petitioner's conviction for mail fraud, the court noted that petitioner had admitted knowledge that there would be mail communications between the transfer agent for

Next, the district court held that petitioner received effective assistance of counsel in entering his guilty plea. The court held that petitioner's counsel "had a well-conceived trial strategy for the defense of this case." Pet. App. 36b. The court found that petitioner's trial counsel adequately reviewed the government's documentary evidence prior to trial and that this evidence and counsel's discussions with petitioner convinced counsel that the government's case "was much stronger than originally anticipated." *Id.* at 37b. The court further concluded that trial counsel "found it difficult to find witnesses to testify on [petitioner's] behalf." *Id.* at 38b. Based on its review of the evidence presented at the Rule 32(d) hearings, the court found that "trial counsel attempted to develop a prudent trial strategy and investigated it to the extent possible," but that counsel "[u]ltimately" determined that petitioner did not have a valid defense to the indictment. Pet. App. 41b.

The court also concluded that petitioner was not prejudiced by counsel's failure to move for a bill of particulars, because the indictment listed the names of most of the unindicted co-conspirators and because petitioner himself knew all of the participants in his transactions and could inform trial counsel of their names. Pet. App. 42b.[4] In addition, the court rejected petitioner's argument that his trial counsel should have filed a motion to dismiss Count 9 of the

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LCI and TWC and a bank, and that the bribery scheme and transfer of stock "could not have occurred without these communications, as [petitioner] admitted." Pet. App. 32b.

[4] The court added that it was "far from certain" that a motion for a bill of particulars would have been granted. Pet. App. 42b & n.33.

indictment, which charged obstruction of justice, on the ground that venue was improper in the District of New Jersey. The court pointed out that a majority of the circuits have held that venue is proper in the district where the proceeding sought to be obstructed was pending, and that petitioner could not "demonstrate [that a] venue motion would have produced favorable results." *Id.* at 43b.

Finally, the court rejected petitioner's claim that his guilty plea proceeding did not conform to Federal Rule of Criminal Procedure 11. It found that allowing the prosecutor to question petitioner in order to establish the factual basis for the plea had not prejudiced petitioner. It also found that petitioner "had a full and complete understanding of his conduct and the charges against him." Pet. App. 53b, 58b.[5]

5. The court of appeals, in an unpublished opinion, affirmed the district court's order "essentially for the reasons set forth" in the district court's opinion. Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 6-15) that the district court erred in accepting his guilty plea. He argues that, under *Dirks* v. *SEC*, 463 U.S. 646 (1983), *Chiarella* v. *United States*, 445 U.S. 222 (1980), and *United States* v. *Carpenter*, 791 F.2d 1024 (2d Cir. 1986), aff'd by an equally divided court, 484 U.S. 19 (1987), he did not have a duty to disclose material information and therefore did not commit fraud by nondisclosure. That contention is without merit. Petitioner's liability under the securities laws did not

[5] The court reimposed the same sentence that it had originally imposed on petitioner, stating that it had not considered the data regarding sentences in other fraud cases. Pet. App. 12b. Petitioner's sentence is not at issue in this Court.

arise from mere silence; rather, it resulted from his affirmative and systematic acts of manipulation and misrepresentation, which defrauded investors in the markets for LCI and TWC and in the funds whose managers petitioner bribed. A person who has no disclosure duty, and does not commit fraud by remaining silent, still commits fraud if he engages in affirmatively misleading acts. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240 n.18 (1988).

Dirks, *Chiarella*, and *Carpenter* all address the liability of a purchaser or seller of securities under Rule 10b-5 for remaining silent while in possession of material, non-public information. In *Chiarella* and *Dirks* the Court held that silence constitutes fraud under Rule 10b-5 only when the trader has a duty to speak, but fails to make disclosure. *Dirks*, 463 U.S. at 653-654; *Chiarella*, 445 U.S. at 226-230. While noting that corporate officers, directors, and other insiders owe their shareholders fiduciary duties and must disclose material information when trading in the company's securities, the Court determined in those cases that certain corporate outsiders were not under a fiduciary duty to make disclosure, and therefore had not violated Rule 10b-5 when failing to disclose non-public information in their possession. *Dirks*, 463 U.S. at 653-655, 659; *Chiarella*, 445 U.S. at 227-230.[6] In *Carpenter* the Second Circuit held

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[6] The outsider in *Chiarella* was a financial printer who deduced the names of takeover targets from materials submitted to the print shop, then traded in the securities of those companies without disclosure. The outsider in *Dirks* was a financial analyst who learned from a corporate insider of a fraud in the company, following which the analyst advised his clients to sell the company's stock. Although the Court found that neither of those outsiders had disclosure duties, the Court stated in *Dirks* that corporate outsiders who acquire material

that a person who fraudulently misappropriates information and then uses the non-public information to trade in securities commits securities fraud under Rule 10b-5. 791 F.2d at 1031, 1034.[7]

As this Court has recognized, however, even a person who owes no duty to disclose may still commit fraud. Rule 10b-5 also applies to "affirmative misrepresentations by those under no duty to disclose (but under the ever-present duty not to mislead)." *Basic Inc.* v. *Levinson*, 485 U.S. at 240 n.18. The Rule is violated "whenever assertions are made * * * in a manner reasonably calculated to influence the investing public, * * * if such assertions are false or misleading or so incomplete as to mislead." *Id.* at 235 n.13, quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). The same holds true for affirmative acts of manipulation. See, *e.g.*, *United States* v. *Charnay*, 537 F.2d 341, 349-351 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

Here, petitioner admitted to engaging in affirmatively manipulative and misleading acts and statements, which provided an ample factual basis for his guilt on the securities fraud counts. First, he admitted, as to Count 1, that he bribed fund man-

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non-public information from a corporate insider, in breach of the insider's fiduciary duty, do acquire the insider's duty to make disclosure when trading with the company's shareholders. 463 U.S. at 659-661.

[7] The Second Circuit had so held previously in other cases. See *United States* v. *Newman*, 664 F.2d 12 (1981), aff'd after remand, 722 F.2d (Table), cert. denied, 464 U.S. 863 (1983); *SEC* v. *Materia*, 745 F.2d 197 (1984), cert. denied, 471 U.S. 1053 (1985); accord *SEC* v. *Clark*, 915 F.2d 439 (9th Cir. 1990).

agers into purchasing, on behalf of their funds, securities in a company in which he was a corporate insider, and in which he held a substantial stake, which artificially affected price and demand. As petitioner stated, the creation of a false appearance of demand for LCI stock was designed to benefit himself personally, and it worked a fraud on persons who bought LCI stock as a result. Moreover, as the district court noted, petitioner's bribery scheme "worked a fraud on shareholders of the [f]unds in violation of Rule 10b-5." Pet. App. 30b. Cf. *Index Fund, Inc.* v. *Hagopian*, 609 F. Supp. 499 (S.D.N.Y. 1985).

Similarly, as to Counts 2 and 3, petitioner admitted to fraud by misrepresentation. Petitioner rendered the LCI prospectus misleading when he omitted to state that he had secretly taken an allocation of stock in the initial public offering. He breached his "ever-present" duty not to mislead when he failed to see to it that the prospectus was corrected to reflect his use of nominee accounts to purchase LCI securities. Cf. *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972); *SEC* v. *Blinder Robinson & Co.*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,491 (10th Cir. Sept. 19, 1983), cert. denied, 469 U.S. 1108 (1985); *SEC* v. *Scott*, 565 F. Supp. 1513 (S.D.N.Y. 1983), aff'd, 734 F.2d 118 (2d Cir. 1984).[8]

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[8] Petitioner's contention (Pet. 9) that he could not have disclosed his purchases in the prospectus because he bought after the prospectus became effective and was first issued ignores the required use of the prospectus in aftermarket trading, see generally L. Loss, *Fundamentals of Securities Regulation* 116-118 (2d ed. 1988); SEC Rule 174, 17 C.F.R. 230.174, and the need to correct the prospectus to reflect post-effective events that render the prospectus misleading. The contention that "[t]he prospectus did, however, list petitioner

Finally, as to Counts 4 through 6, petitioner admitted that his TWC research report was misleading in that it failed to reveal his use of nominee accounts to trade in TWC securities, his bribery arrangements with Vickory and Fritz, and his financial and executive position at LCI. Without those disclosures, the report was misleading because it purported to be the work of a disinterested securities analyst. In sum, even if petitioner could have remained wholly silent, he chose to speak. By doing so in a misleading fashion, he engaged in fraud.[9]

Petitioner also argues (Pet. 13-14) that his acts and statements were not materially misleading, and thus did not violate Rule 10b-5. Materiality is de-

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as an officer of LCI and set forth a substantial stock position held in his name" (Pet. 7) misses the point. What was of importance was petitioner's undisclosed role in facilitating the public offering through his secret purchases in the offering, thereby making the public demand for the securities seem greater than it actually was.

[9] That is not to say petitioner owed no disclosure duties. As an officer and director of LCI, petitioner was a classic corporate insider who owed a fiduciary duty of disclosure when trading in LCI securities. *Chiarella*, 445 U.S. at 227-230. Petitioner breached that duty when he sold LCI securities from his nominee accounts into the aftermarket while failing to disclose to purchasers that the apparent public demand for LCI securities had in fact been procured in significant part by bribing fund managers, and by a corporate insider's taking an allocation of securities in the offering. Petitioner, as a securities broker, also had disclosure duties as to TWC as a result of his recommendation of that company's securities. See generally L. Loss, *Fundamentals of Securities Regulation* 825-826 (2d ed. 1988) (discussing obligation of broker-dealer recommending securities to disclose any bias of the firm, its partners, officers, and directors, or of any employee assuming responsibility for the recommendation).

termined by whether a reasonable shareholder, given all available information, would consider the misstated or omitted information to be important in making an investment decision. See *Basic Inc.* v. *Levinson*, 485 U.S. at 231-232; *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). Petitioner admitted sufficient facts to establish a basis for finding that his acts and statements were materially misleading. The concealed facts here—that fund managers were being bribed to purchase securities on behalf of their funds; that a corporate insider was secretly purchasing stock in an initial public offering, thus making it appear that there was bona fide public demand for the stock; that a research analyst recommending the purchase of a company's securities was in fact selling large blocks of these securities through nominee accounts; that the recommended securities were held by persons whom the research analyst had bribed with the securities; and that the research analyst was an officer and director of a company affiliated with the company he was recommending—could well have "assumed actual significance in the deliberations" of the reasonable investor. *TSC*, 426 U.S. at 449.

Petitioner also misses the mark in contending (Pet. 14) that he did not admit scienter. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976). During the guilty plea proceeding, petitioner admitted that he acted knowingly and intentionally in inducing purchases by the funds of LCI securities, in issuing a false and misleading research report, and in failing to correct a prospectus to disclose material information. C.A. App. 91. Such admissions establish petitioner's knowing participation in violations of the securities laws.

Petitioner also contends (Pet. 15) that he failed to admit facts sufficient to uphold his mail fraud con-

viction because, based on his admissions, the charged mailing was not in furtherance of the scheme. As petitioner admitted, the bank that purchased LCI stock as part of the conspiracy would likely communicate, by mail, with LCI's transfer agent in order to consummate the bank's securities transaction. Pet. App. 8b. Unlike the credit card invoices that were held not to further the fraud involved in *United States* v. *Maze*, 414 U.S. 395 (1974), the communications with the transfer agent here were integral to an ongoing scheme that vitally depended on the completion of securities transactions. Under *Schmuck* v. *United States*, 489 U.S. 705, 712 (1989), the mailings furthered the scheme because it did not "reach fruition" until the securities transactions were completed.

2. Petitioner next contends (Pet. 16-23) that his trial attorneys rendered ineffective assistance of counsel. Specifically, he argues that his trial attorneys erred in failing to move for a bill of particulars, to make a motion to dismiss the obstruction of justice count for lack of venue, and to conduct an adequate factual investigation prior to advising him to enter a guilty plea. The district court properly rejected this fact-bound claim.

To establish ineffective assistance of counsel in the guilty plea process, a defendant must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that but for counsel's unprofessional errors, he would not have pleaded guilty and would have insisted on going to trial. See *Hill* v. *Lockhart*, 474 U.S. 52, 58-59 (1985). A "strong presumption" exists that counsel's performance was reasonable *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). Even "where there is a bone fide defense, counsel may still advise his client to plead guilty if that ad-

vice falls within the range of reasonable competence under the circumstances." *United States* v. *Cronic*, 466 U.S. 648, 657 n.19 (1984).

None of petitioner's claims meets these standards. As the district court held, a bill of particulars would not have materially aided petitioner's defense, because the indictment listed the names of most of the relevant unindicted co-conspirators and because petitioner could have provided his attorneys with the names of the potential witnesses. The indictment in this case is sufficiently detailed to give petitioner adequate notice of the substance of the charges against him without a bill of particulars. Nor has petitioner identified any specific information that he would have obtained through a bill of particulars. Thus, he was not prejudiced by counsel's failure to move for one.

Petitioner also is incorrect in asserting (Pet. 19-20) that a motion for dismissal of Count 9 charging obstruction of justice "would have been successful." Petitioner argues that the district court would have dismissed that count for lack of venue because the acts allegedly giving rise to the obstruction took place outside of the District of New Jersey. In fact, the district court expressed doubt that it would have granted such a motion. It also correctly found that counsel was not ineffective in failing to file such a motion because the great majority of courts that have considered this issue have held that venue for an obstruction of justice charge is proper in the district where the obstructed proceeding is pending. Pet. App. 43b.

The district court properly rejected petitioner's claim (Pet. 20-22) that his trial counsel did not undertake an adequate investigation. As detailed by the district court, Pet. App. 36b-39b, trial counsel reviewed the documentary evidence and interviewed or

attempted to interview relevant witnesses prior to trial as part of a "well-conceived trial strategy for the defense of this case." *Id.* at 36b. Trial counsel's attention shifted from preparation to consideration of a plea only upon learning from the investigation that the prosecution's "case was much stronger than originally anticipated." *Id.* at 37b. There is also no merit to petitioner's claim that counsel selected an investigator hired by an unindicted co-conspirator. As the district court found, petitioner "directed" counsel to employ this investigator. Pet. App. 38b.

3. Finally, petitioner contends (Pet. 23-24) that his guilty plea colloquy violated this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969), because the district court did not personally question petitioner to establish the factual basis for his guilty plea. The factual basis for petitioner's plea was established first by a statement submitted by petitioner that contained a count-by-count admission that he committed the conduct underlying each offense. See Pet. App. 5b-9b. At petitioner's guilty plea proceeding, petitioner stated that he had reviewed that statement with his attorney and that it was accurate and complete. *Id.* at 9b. In addition, the prosecutor extensively questioned petitioner regarding the conduct underlying the indictment. The district court found that petitioner "denied or equivocated in answer to some of the questions posed by the Government, [but] his proffer as a whole established an adequate factual basis to accept the plea of guilty to all counts." *Ibid.*

Contrary to petitioner's contention, nothing in either this Court's decision in *McCarthy* or in Rule 11 requires the district court to ask all of the questions designed to establish the factual basis for the charges to which a defendant is pleading guilty. Rule 11(f) requires only that the court "satisfy" itself that "there is a factual basis for the plea." See also Rule

11(c)(5) (emphasis added) ("*if* the court intends to question the defendant under oath * * * about the offense to which the defendant has pleaded" it must inform him that his statements may be used against him). The Advisory Committee's 1974 notes to Rule 11 specifically state that the Rule does not require "that any particular type of inquiry be made." Moreover, the courts of appeals have routinely upheld guilty pleas against challenges that they lack a factual basis based only on the defendant's own admissions or proffers by the prosecutor. See, *e.g.*, *United States* v. *Montoya*, 891 F.2d 1273, 1295 (7th Cir. 1989); *Harvey* v. *United States*, 850 F.2d 388, 395 & n.4 (8th Cir. 1988); *United States* v. *Carter*, 815 F.2d 827, 829 (1st Cir. 1987); *United States* v. *Trott*, 779 F.2d 912, 914 (3d Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20510